Lexus of Concord, Inc. *and* Machinists Automotive Trades District Lodge 190, Local Lodge 1173, International Association of Machinists & Aerospace Workers, AFL–CIO. Cases 32–CA–18925 and 32–CA–19003

December 8, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On February 11, 2002, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party also filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

This case primarily concerns the Respondent's withdrawal of recognition from the Union on June 1, 2001.[3] The judge found that the Respondent's withdrawal of recognition was unlawful. We disagree.

Factual Background

In September 2000, the Respondent commenced bargaining with the Union pursuant to an order of the National Labor Relations Board. *Lexus of Concord, Inc.*, 330 NLRB 1409 (2000). The parties held five bargaining sessions, concluding with a session on February 20. On March 2, the Respondent transferred employee Dave Burman into the bargaining unit position of "installer" without notice to or bargaining with the Union. The Union had previously agreed to the creation of the installer classification and had acquiesced in the placement of two employees in the position. In doing so, however, the Union specifically requested bargaining regarding future transfers into the installer position.

On March 26, 21 of the 22 unit employees notified the Respondent in writing that they no longer wanted the Union to represent them and planned to file a decertification petition with the Board. The employees demanded that the Respondent cease all negotiations with the Union. In response to the employees' letter, the Respondent temporarily removed its contract proposals from the table and placed further bargaining "on hold" so that it could "understand this situation further." The parties did not meet on March 27 as previously scheduled and the Union filed a refusal to bargain charge the next day.

Approximately 3 weeks later, on April 17, the employees filed a decertification petition supported by 21 signatures collected on April 16 and 17. The Regional Director suspended processing of the decertification petition on April 19 in light of the Union's previously filed refusal-to-bargain charge. That same day, the Respondent sent the Union a letter stating that the Respondent was confident that the parties could continue bargaining in good faith despite the employees' March 26 demand that bargaining with the Union cease. On May 1, the Regional Director, citing the Respondent's April 19 letter, dismissed the Union's March 28 refusal to bargain charge. The dismissal letter noted that the Respondent had reaffirmed its recognition of the Union and its obligation to continue bargaining, and dismissed the charge on the grounds that it would not effectuate the purposes of the Act to pursue this allegation and issue a complaint. The parties met on May 4 but made little progress on the remaining contract issues.[4] On June 1, the Respondent, relying on the employees' April 17 decertification petition, withdrew recognition from the Union.

The Judge's Decision

Despite compelling evidence that the Union did not enjoy the majority support of unit employees, the judge concluded that the Respondent's withdrawal of recognition from the Union violated Section 8(a)(5) and (1). First, the judge found that the Respondent's failure to bargain over the transfer of Burman in March tainted the employees' April 17 decertification petition. Second, the judge found that the employees signed the decertification petition at a time when the Respondent was refusing to bargain with the Union, conduct the judge presumed to have caused employee disaffection. Finally, the judge equated the Regional Director's dismissal of the Union's refusal to bargain charge as akin to a unilateral settlement and, applying settlement bar principles, found the subsequent withdrawal of recognition unlawful because a reasonable period of time for bargaining had not elapsed.

Analysis

An overwhelming majority of bargaining unit employees unequivocally rejected the Union as their bargaining representative in the March 26 letter sent to the Respon-

[1] There are no exceptions to the judge's findings that the Respondent's attorney, John Boggs, was an agent within the meaning of Sec. 2(13); that the Respondent violated Sec. 8(a)(5) by failing to provide relevant information requested by the Union; and that the Respondent did not violate Sec. 8(a)(1) and (5) by placing employee Dave Burman in the "used car preparation" position in October 2000.

[2] We have modified the judge's remedy in order to conform it to the Board's usual remedial provisions for the violations found herein, consistent with our finding that the Respondent lawfully withdrew recognition from the Union on June 1, 2001.

[3] All dates refer to 2001 unless otherwise indicated.

[4] There is no allegation that this was bad-faith bargaining.

dent. The employees reaffirmed their rejection of the Union on April 17 by filing a decertification petition. This evidence of employee disaffection privileged the Respondent's withdrawal of recognition if no legal barrier precluded reliance on it. *LTD Ceramics, Inc.*, 341 NLRB 57, 61 (2004). Unlike the judge, we find that no such barriers existed here. Accordingly, the Respondent lawfully withdrew recognition from the Union on June 1.[5]

1. Taint

We agree with the judge that the Respondent's placement of employee Burman in the "installer" position without bargaining with the Union violated Section 8(a)(5) and (1). However, the judge also reasoned that this unfair labor practice occurred close in time to the Respondent's withdrawal of recognition, that Burman's placement took work away from other unit employees, and that the Respondent's conduct conveyed to unit employees that it was assigning unit work as it pleased and could eliminate overtime or other technician work by unilaterally hiring installers for less pay. The judge concluded that the Respondent's unlawful conduct would tend to cause employees to believe that the Union was powerless to assist them and, accordingly, tainted the employees' expression of disaffection from the Union. Contrary to the judge, we find that the Respondent's unilateral placement of Burman in the installer position did not taint the Respondent's subsequent withdrawal of recognition from the Union.

Evidence in support of a withdrawal of recognition "must be raised in a context free of unfair labor practices *of the sort likely*, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Lee Lumber & Building Material Corp.,* 322 NLRB 175, 177 (1996) *(Lee Lumber II*), enfd. in relevant part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997) (citing *Guerdon Industries*, 218 NLRB 658, 659, 661 (1975)) (emphasis added); see generally *LTD Ceramics*, supra. But not every unfair labor practice will taint evidence of a union's subsequent loss of majority support. In *Lee Lumber II*, the Board noted that "in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be *specific proof of a causal relationship* between the unfair labor practice and the ensuing events indicating a loss of support." 322 NLRB at 177 (footnote omitted and emphasis added). The criteria for determining whether a causal relationship has been established include: "(1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union." *LTD Ceramics*, supra (quoting *Master Slack Corp*., 271 NLRB 78, 84 (1984)).

Although the Respondent placed Burman in the installer position 3 months before withdrawing recognition, there was no showing that Burman's transfer had a detrimental or lasting effect on employees. The Union previously had approved the installer classification, so it was not a newly created position. Additionally, Burman performed only "waiter" work (i.e., routine maintenance tasks), which was abundant and disliked by many technicians in the shop. Thus, Burman was not taking work away from other unit employees as the judge reasoned.

The nature of the unfair labor practice also militates against a finding of taint. It was not the Respondent's placement of Burman in the installer position but, rather, the Respondent's failure to bargain over such placement that was unlawful. There is no evidence that unit employees knew that the Respondent implemented the transfer without notice to the Union. Moreover, the Respondent had a past practice of hiring installers from the ranks of its own employees, so Burman's transfer was not unusual, and would not have signaled anything out of the ordinary to unit employees.

The Respondent introduced undisputed evidence showing that the unit employees' disaffection from the Union arose well before Burman's transfer. Specifically, Technician Scott Hudson testified that the employees' discontent with the Union had been growing for a few months. Technician Bob Stevens also testified that multiple discussions concerning dissatisfaction with the Union occurred among unit employees as early as December 2000, and continuing into March 2001. The judge, however, erroneously rejected this evidence because it predated the Respondent's return to the bargaining table. The issue here is whether the Respondent's placement of Burman in the installer position without bargaining with the Union caused employee disaffection. Hence, evidence that employee disaffection arose prior to, and independently of, the Respondent's unfair labor practice conduct is relevant to this inquiry, and supports our finding that the placement of Burman in the installer position

[5] This case does not involve any consideration of whether the Respondent had a good-faith doubt regarding the Union's majority status. It is clear that a near unanimous majority of employees no longer wanted the Union to represent them. Thus, the evidence of employee disaffection in this case would satisfy either the "actual loss of majority" standard established in *Levitz*, 333 NLRB 717 (2001), or the "good faith doubt" standard discussed in *Celanese Corp.*, 95 NLRB 664 (1951).

did not cause the employees' disaffection from the Union.

Having considered the *Master Slack* factors outlined above, we conclude, unlike the judge, that there is no "specific proof of a causal relationship" between the Respondent's unlawful conduct and the employees' disaffection from the Union.[6] Therefore, the Respondent's unlawful unilateral transfer of Burman did not preclude its subsequent withdrawal of recognition from the Union.

2. Presumed taint

According to the judge, the Respondent's proposal that the parties put bargaining "on hold," its withdrawal of pending contract offers, and the lengthy hiatus in bargaining that followed constituted a general refusal to bargain. The judge therefore presumed that because the signatures supporting the April 17 decertification petition were collected at a time when the Respondent was unlawfully refusing to bargain with the Union, the Respondent's refusal to bargain caused the employees' disaffection. We disagree.[7]

The Board has stated that when employee disaffection arises in the context of an unlawful general refusal to bargain with an incumbent union, the causal relationship between the unlawful act and the union's subsequent loss of majority support may be presumed. *Lee Lumber II*, 322 NLRB at 177. If an employer unlawfully deprives a union of the opportunity to represent its members, the Board has reasoned that employees will soon become disenchanted with that union, because it apparently can do nothing for them. Id. (citing *Caterair International*, 322 NLRB 64, 67 (1996)). In the instant case, however, the *Lee Lumber* presumption does not apply because the Respondent did not unlawfully refuse to bargain with the Union during the period when the signatures supporting the decertification petition were collected.

Initially, we find that the Respondent's suspension of bargaining was a reasonable response to the employees' March 26 letter demanding that the Respondent immediately cease all negotiations with the Union. Though the Respondent arguably could have withdrawn recognition from the Union upon receipt of the employees' letter, it did not do so. Instead, the Respondent notified the Union that:

> Under normal circumstances, we would simply withdraw recognition and refuse to bargain further as the letter clearly purports to place in serious doubt the Union's continuing majority status. However, I do not believe it is in our mutual best interest to do so at this time. I believe that we should put everything on hold.

Thus, the Respondent explicitly indicated that it was not withdrawing recognition or refusing to bargain but instead wanted to delay additional negotiation sessions until it sorted out the situation. Given receipt of a virtually unanimous employee demand for an immediate cessation of all negotiations with the Union, we conclude that the Respondent's March 26 request to put negotiations "on hold" cannot reasonably be construed as a general refusal to bargain.[8]

The judge acknowledged that in these circumstances a "brief hiatus might be understandable," but concluded that the hiatus was too long and effectively blossomed into a refusal to recognize and to bargain with the Union. We endorse the judge's observation that an employer ought to have a reasonable amount of time to consider its obligations following receipt of a letter like the one delivered to the Respondent on March 26.[9] We disagree, however, that the Respondent unduly delayed its response. In assessing the reasonableness of the length of the bargaining hiatus, we are mindful of the events that took place immediately following the March 26 suspension of bargaining—the Union's refusal-to-bargain charge was filed on March 28, the Board issued its decision in *Levitz* on March 29, and the employees filed a decertification petition on April 17. Given the complex-

[6] Cf. *AT Systems West, Inc.*, 341 NLRB 7, 11 (2004) (finding that solicitation of decertification petition and direct dealing tainted employee disaffection); *Bridgestone/Firestone, Inc.*, 332 NLRB 575, 576 (2000), enfd. in relevant part sub nom. *Teamsters v. NLRB*, 47 Fed. Appx. 449 (9th Cir. 2002) (unpublished) (same).

[7] We note that the April 17 decertification petition was the second employee expression of disaffection presented to the Respondent. Considering that we find no barriers to the Respondent's reliance on the April 17 expression of disaffection as a basis for its withdrawal of recognition on June 1, it is unnecessary to pass on whether the Respondent was also privileged to rely on the March 26 employee expression of disaffection from the Union as a basis for its June 1 withdrawal of recognition.

[8] At the hearing, the Union's chief negotiator, Vern Dutton, testified that he did not view the letter as a withdrawal of recognition. Dutton's testimony regarding whether the letter was a suspension of bargaining was contradictory. Dutton initially testified that he understood the letter to be putting a hold on negotiations until the Respondent could "get a hold of the board [sic] and get some ideas on what position the company should take" regarding the employees' letter. According to Dutton, "That's exactly what [the] letter said and that's the way I read it." Dutton later contradicted this testimony in response to the General Counsel's leading question:

> Q: [D]id you take [the March 26 letter] as the employer's refusal to bargain?
>
> A: Yes."

When read as a whole, however, and in conjunction with the text of the letter itself, Dutton's testimony tends to support our interpretation of the March 26 letter.

[9] Cf. *Massey-Ferguson, Inc.*, 184 NLRB 640, 644 fn. 6 (1970), enfd. 78 LRRM (BNA) 2289 (7th Cir. 1971) (per curiam) (finding that 9-day delay in bargaining following employees' expression of disaffection was reasonable delay not general refusal to bargain).

ity of the developments since the March 26 suspension of bargaining and the Respondent's clear need to understand the situation, we conclude that the Respondent's delay in bargaining was not a repudiation of its bargaining responsibilities.[10]

In finding a general refusal to bargain, the judge also cited the fact that the Respondent removed its contract offers from the table. We do not agree with the judge that this fact supports a finding of a general refusal to bargain. Removing the contract offers from the table was necessary to accomplish the Respondent's stated purpose of "put[ting] everything on hold," because if it had failed to do so the Union could have accepted the offers and thereby attempted to forestall any further inquiry into its continued majority status. See *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996) (finding unlawful employer's withdrawal of recognition after the union accepted contract offer when the basis for withdrawing recognition arose prior to the union's acceptance of the outstanding contract offer). In these circumstances, we find that neither the delay in resuming bargaining nor the withdrawal of contract offers outweigh the clear import of the Respondent's March 26 letter, which disavowed any intent to withdraw recognition or to refuse generally to bargain.

In sum, after considering all of these factors, the Respondent's suspension of bargaining on March 26 was reasonable and did not amount to a general refusal to bargain with the Union. Thus, we do not presume, as the judge did, that the employee disaffection on April 17 was caused by the suspension of bargaining on March 26, and we find that the pause in bargaining does not bar the Respondent's reliance on the employees' April 17 expression of disaffection as a basis for its withdrawal of recognition from the Union.[11]

[10] The cases relied on by the judge in support of her finding that a general refusal to bargain took place are distinguishable. For example, in *Bridgestone/Firestone, Inc.*, 337 NLRB 133, 133 (2001), the Board found that the employer expressly said that it would no longer bargain with the union when it withdrew its contract offer. In contrast, the Respondent expressly stated that it was not withdrawing recognition and instead sought a brief suspension of bargaining to consider how to proceed in light of the employees' overwhelming expression of disaffection. In *Wyandanch Engine Rebuilders, Inc.*, 328 NLRB 866, 877 (1999), the employer consistently refused to meet with the union without excuse and unequivocally rejected the union—facts simply not present here. Moreover, the Respondent never unequivocally refused to bargain with the Union as the employer did in *Exxel-Atmos, Inc.*, 309 NLRB 1024, 1029 (1992), review denied in part and remanded 28 F.3d 1243 (D.C. Cir. 1994), where the employer made it "absolutely clear" that it did not want to engage in formal negotiations with the union until the union demonstrated its majority status by winning an election.

[11] Our dissenting colleague adopts the judge's analysis finding a general refusal to bargain. As explained above, however, when given its proper weight the relevant evidence establishes that the Respondent's delay in bargaining was not a repudiation of its bargaining responsibilities.

Further, even assuming arguendo that the Respondent's suspension of negotiations on March 26 constituted a general refusal to bargain, there is no evidence in this case indicating that such a refusal to bargain was *unlawful*. Indeed, to the contrary, the Respondent "refused to bargain" only after it received a letter signed by 21 of 22 unit employees, indicating that they no longer wanted the Union to represent them. Pursuant to precedent existing at that time, the Respondent would have been entitled to withdraw recognition from the Union based on the employee letter. Nevertheless, our dissenting colleague, citing *Lee Lumber II*, supra, concludes that the Respondent's March 26 action should be presumed to taint its subsequent withdrawal of recognition on June 1. Our dissenting colleague cites no authority for the proposition that the *Lee Lumber* presumption of taint may be applied in the absence of a finding that the refusal to bargain was *unlawful*. Instead, our colleague relies on Board decisions finding that, in certain contexts, settled unfair labor practice allegations may be deemed to taint a subsequent expression of employee disaffection. However, as we discuss in greater detail in section 3 below, there was no settlement agreement in this case; accordingly, the cases cited by our dissenting colleague are inapposite.

In any event, we note (as does our colleague) that the D.C. Circuit denied enforcement of the Board's decision in *Wyndham Palmas Del Mar Resort & Villas*, 334 NLRB 514 (2001), cited by the dissent. In *Wyndham*, a Board majority concluded that it was appropriate to apply the *Master Slack* causation analysis—used for determining whether unremedied unfair labor practice conduct has tainted a subsequent showing of employee disaffection from a union—to *settled* unfair labor practice conduct as well as *adjudicated* unremedied unfair labor practices. On review, the D.C. Circuit criticized the Board for finding that *settled* unfair labor practice charges caused the loss of employee support for the union (i.e., "find[ing] a violation of the Act in the absence of substantial evidence"). *BPH & Co. v. NLRB*, 333 F.3d 213, 222 (D.C. Cir. 2003).

3. Settlement bar

The judge's final theory supporting her determination that the Respondent unlawfully withdrew recognition from the Union draws on settlement bar principles. The judge reasoned that the Respondent's April 19 letter expressing its willingness to continue bargaining was intended to induce the Regional Director to dismiss the Union's pending refusal to bargain charge. Because the Regional Director did in fact dismiss the charge after receiving the letter, the judge equated the sequence of events to a unilateral settlement agreement, which obligated the Respondent to bargain for a reasonable time after dismissal of the charge. Because, in her view, a reasonable period had not elapsed, the judge concluded that the unilateral settlement barred the Respondent's withdrawal of recognition.

We find that the judge erred in extending settlement bar principles to the facts of this case, because the Respondent did not enter into a settlement agreement, express or implied, with either the Regional Director or the Union. When an employer settles unfair labor practice charges and agrees to bargain with the union in exchange for the dismissal of those charges, the Board will infer an

agreement to bargain for a reasonable period of time following the settlement; otherwise, the employer's promise would be illusory. See generally *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951); *Douglas-Randall, Inc.*, 320 NLRB 431, 432–434 (1995). In such cases, an employer may not withdraw recognition, irrespective of the union's majority status, unless the parties have bargained for a reasonable period of time following execution of the settlement agreement. *AT Systems West*, 341 NLRB 57, 61 (2004).[12] A critical factual predicate to the application of the *Poole Foundry* settlement bar, however, is the presence of a settlement agreement, and none exists here.[13]

The judge attempted to supply the missing settlement agreement by inferring, with no basis in fact, that: (1) the Respondent intended its April 19 letter to the Union stating that it "stands ready to resume negotiations" to induce the Regional Director's dismissal of the Union's refusal-to-bargain charge, and (2) that the dismissal of the charge was a quid pro quo for the Respondent's resumption of bargaining. As to the Respondent's intent, the judge's decision rests on pure speculation because the record is devoid of evidence that the Respondent sent the letter to secure dismissal of the charge. Similarly, while the Regional Director's dismissal letter notes that the Respondent reaffirmed recognition of the Union and a continuing obligation to bargain, the dismissal letter does not state or imply that that dismissal of the charge provided the consideration for the Respondent's implied promise. A settlement bar arises only when a complaint is dismissed "pursuant to a settlement agreement," and the requisite quid pro quo to establish such an agreement is absent here.[14] Accordingly, the judge erred in finding that the Respondent could not lawfully withdraw recognition from the Union based on the nearly unanimous and clearly expressed disaffection of its employees.[15] Our dissenting colleague recognizes that there must be a settlement agreement in order to impose a settlement bar. He also recognizes that the existence of such an agreement is established by proof that the agreement to bargain was a quid pro quo for the dismissal of the charge. Like the judge, he would imply a quid pro quo based on the timing and sequence of events, and from that he would imply a settlement agreement with an implied agreement to bargain for a reasonable period. As we have explained, there is neither precedent nor factual support for this position.

Conclusion

Where a majority of unit employees have expressed their disaffection from the union and the union does not, in fact, enjoy majority support of the unit employees, we must determine whether any legal barriers exist to the employer's reliance on evidence of that disaffection as a basis for withdrawal of recognition from the union. Having conducted that inquiry here, we find no barriers to the Respondent's reliance on the employees' expression of disaffection from the Union. Accordingly, we dismiss the withdrawal of recognition allegations of the complaint.[16]

AMENDED CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring employee Burman into the "installer" position on March 2, 2001, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the transfer and the effects of the transfer at a time when the Respondent was obligated to bargain with the Union regarding such transfers.

2. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with unit employee classifications and wage histories and any other information requested by the Union that was relevant and necessary to the performance of its duties as the

[12] The Board has applied this principle to informal as well as formal settlements and to unilateral settlements as well as those in which all parties join. *AT Systems*, supra (informal settlements); *Lexus of Concord*, 330 NLRB at 1415 (unilateral settlements).

[13] Even in cases where a valid settlement agreement exists, reviewing courts have rejected the expansive view of settlement bar principles espoused by the judge. See *BPH & Co. v. NLRB,* supra (no settlement bar where settlement agreement did not cover 8(a)(5) charges and agreement did not include a promise to bargain); *NLRB v. Key Motors Corp.,* 580 F.2d 1388 (7th Cir. 1978) (no settlement bar, where agreement contained a promise to bargain but did not settle 8(a)(5) charges); *NLRB v. Vantran Electric Corp.,* 580 F.2d 921 (7th Cir. 1978) (no settlement bar where settlement agreement covered 8(a)(5) charges but dismissal of state court lawsuit, not agreement to bargain, was quid pro quo for union's agreement to withdraw charges). Our decision today is consistent with the views of these courts.

[14] *NLRB v. Vantran Electric Corp*., supra, at 924–925 (absent explicit language, agreement to bargain does not establish settlement bar unless it was "a quid pro quo for the union's agreement to withdraw its Sec. 8(a)(5) charge"); *NLRB v. Accurate Web, Inc.,* 818 F.2d 273, 275 (2d Cir. 1987) (examining whether employer's promise to bargain was quid pro quo for union's withdrawal of charge). Accord: *Liberty Fabrics,* 327 NLRB 38, 39 (1998) (defining informal settlement agreement as a "mutual agreement . . . on which the Regional Director relied in approving the withdrawal of the charges").

[15] Member Meisburg is of the view that in the future, prior to dismissing unfair labor practice charges on noneffectuation grounds, the General Counsel should endeavor to execute written settlement agreements in circumstances similar to those present in this case.

[16] As we have found that there were no barriers to the Respondent's withdrawal of recognition from the Union on June 1, we shall also dismiss the allegation that the Respondent violated Sec. 8(a)(5) and (1) by implementing a wage increase at the same time that it withdrew recognition. *LTD Ceramics, Inc.*, 341 NLRB 86 fn. 3 (2004); *Johns-Manville Sales Corp.*, 282 NLRB 182, 183 (1986).

exclusive bargaining representative of employees in the unit at a time when the Respondent was obligated to provide such information.

3. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated Section 8(a)(5) and (1) of the Act in any other manner alleged in the complaint except as specifically found herein.

ORDER

The National Labor Relations Board orders that the Respondent, Lexus of Concord, Inc., Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally transferring employees into the "installer" position without prior notice to the Machinists Automotive Trades, District Lodge 190, Local Lodge 1173, International Association of Machinists & Aerospace Workers, AFL–CIO and without affording the Union an opportunity to bargain with respect to the transfer and the effects of the transfer at a time when the Respondent is obligated to bargain with the Union regarding such transfers.

(b) Failing and refusing to provide the Union with unit employee classifications and wage histories and any other information requested by the Union that is relevant and necessary to the performance of its duties as the exclusive bargaining representative of unit employees at a time when the Respondent is obligated to provide such information.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Concord, California, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2, 2001.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

MEMBER WALSH, concurring and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring Dave Burman into a unit position and by failing and refusing to provide the Union with requested information that was relevant and necessary to the Union's performance of its duties as collective-bargaining representative.

Contrary to my colleagues, however, I would find that the Respondent also violated Section 8(a)(5) and (1) when it abruptly withdrew recognition of the Union on June 1, 2001,[1] less than a month after it resumed bargaining with the Union, and after only one negotiating session, on May 4. The Respondent withdrew recognition based on an April 17 decertification petition signed by almost all of the approximately 22 unit employees. The Respondent, however, could not rely on that petition lawfully to withdraw recognition, because the signatures on it, obtained on April 16 and 17, were tainted by the Respondent's refusal to bargain with the Union from March 26 through April 19. Thus, the Respondent unlawfully withdrew recognition and thereafter unlawfully unilaterally granted an across-the-board wage increase to which the Union had expressly refused to agree prior to the Respondent's withdrawal of recognition.

Facts

In early 2001, the Respondent and the Union were negotiating for a collective-bargaining agreement. On March 26, the Respondent notified the Union in writing, inter alia, that the Respondent had that day received a letter signed by a "large number" of employees "warn[ing]" the Respondent not to enter into any agreement with the Union and stating that the employees would be filing a decertification petition at the end of the month. The Respondent notified the Union that the Respondent was therefore suspending its contract negotia-

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are 2001 unless stated otherwise.

tions with the Union and removing all of its negotiating offers from the bargaining table.

On March 28, the Union filed an unfair labor practice charge (Case 32–CA–18811–1, not part of the instant proceeding) alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain.

On April 16 and 17, almost all of the approximately 22 unit employees signed a decertification petition, which was then filed on April 17 (Case 32–RD–1377, also not part of the instant proceeding). On April 19, the Regional Director notified the parties in writing that processing of the decertification petition was being suspended because of the pending March 28 refusal to bargain charge against the Respondent. On the same day, April 19, the Respondent notified the Union in writing that the Respondent stood ready to resume contract negotiations, expressly because it felt confident that it could continue to bargain in good faith despite the above March 26 letter it had received from the employees. Accordingly, on May 1, the Regional Director notified the parties that he was dismissing the Union's March 28 refusal to bargain charge against the Respondent. The Regional Director stated in his dismissal letter that:

> [T]he Employer has reaffirmed its recognition of the Union, and its obligation to continue bargaining with it, has re-committed itself to tentative agreements reached to date in bargaining, and has agreed to meet with Union negotiators on May 4. Under these circumstances it would not effectuate the purposes of the Act to pursue this allegation, and I am refusing to issue a complaint. In sum, I am dismissing this charge in its entirety.

The Union did not appeal the Regional Director's decision to dismiss the refusal to bargain charge.[2] Indeed, Union Area Director Vernon Dutton, the Union's chief spokesman during the instant contract negotiations, testified that the Union's charge was dismissed because the parties had returned to the bargaining table.

In the meantime, on April 24, the Union requested in writing that the Respondent provide it with information about the unit employees' wages, job classifications, and benefit packages. (The Respondent ultimately unlawfully failed to provide the requested information before it again withdrew recognition of the Union.)

After the Respondent's April 19 notification that it was willing to resume contract negotiations, and the Regional Director's consequent May 1 dismissal of the March 28 refusal to bargain charge, however, the parties actually met for bargaining only once more, on May 4. (Two further negotiating sessions were scheduled, but the Respondent cancelled both of them.) Then, on June 1, the Respondent withdrew recognition of the Union, on the basis of the April 17 decertification petition showing that a majority of the unit employees no longer wanted to be represented by the Union. On June 6, the Union filed the 8(a)(5) and (1) charge in the instant case, Case 32–CA–18925–1, alleging that the Respondent was unlawfully refusing to bargain with the Union by withdrawing recognition and refusing to provide information. Around this time, in early June, the Respondent unilaterally implemented an across-the-board wage increase to which the Union had expressly refused to agree at the parties' sole negotiating session on May 4.[3]

On July 13, the Regional Director issued the initial complaint in this proceeding, based on the Union's June 6 charge. On July 20, the Acting Regional Director dismissed the April 17 decertification petition because the signatures in support of it were solicited and obtained on April 16 and 17, during the March 26–April 19 period when the Respondent was allegedly unlawfully refusing to bargain with the Union. The Acting Regional Director found that the Respondent's refusal to bargain during the period March 26–April 19 established a presumption that the contemporaneous decertification effort was influenced by this alleged unlawful conduct, which in turn precluded processing of the decertification petition.

The Judge's Decision

The judge preliminarily found that the Respondent's March 26 notification to the Union that the Respondent was suspending contract negotiations and removing all of its negotiating offers from the bargaining table constituted a refusal to bargain and withdrawal of recognition. She further found that the Respondent's subsequent June 1 withdrawal of recognition violated Section 8(a)(5) and (1) on three separate grounds: (a) the April 17 decertification petition was tainted by the unremedied early March unlawful unilateral transfer of Dave Burman into a unit position; (b) the signatures on the petition, obtained on April 16 and 17, were tainted by the Respondent's refusal to bargain with the Union from March 26 through April 19; and (c) the June 1 withdrawal of rec-

[2] The General Counsel's Office of Appeals in Washington, D.C. has administratively advised the Board that Case 32–CA–18811–1 was closed on May 29, 2001, in the absence of an appeal of the Regional Director's decision to dismiss the underlying charge.

[3] The judge found that this unilateral wage increase violated Sec. 8(a)(5) and (1). There are no exceptions to that finding. My colleagues, however, have reversed this unfair labor practice finding because they find that the Respondent's preceding withdrawal of recognition was lawful, and that the Respondent therefore had no obligation to bargain with the Union about the subsequent wage increase. Because I would find the withdrawal of recognition to be unlawful, *and* because there were no exceptions, I would adopt the judge's finding that the unilateral wage increase was unlawful.

ognition took place before a reasonable period of time for bargaining had elapsed following the Regional Director's May 1 dismissal of the Union's March 28 refusal to bargain charge, which dismissal was based on the Respondent's April 19 notification to the Union that the Respondent was ready to resume bargaining in good faith with the Union despite the then-pending decertification proceeding.

My colleagues reject all three of the judge's asserted bases for finding the Respondent's withdrawal of recognition to be unlawful. I find it unnecessary to pass on the first basis, because in any event I agree with the judge about the second and third grounds. Thus, I find that the June 1 withdrawal of recognition was unlawful on the grounds (1) that the signatures on the April 17 decertification petition which the Respondent relied on in withdrawing recognition on June 1 were tainted by the Respondent's refusal to bargain with the Union from March 26 through April 19, and (2), in the alternative, that the Respondent withdrew recognition before a reasonable period of time for bargaining had elapsed following the Regional Director's May 1 dismissal of the Union's March 28 unfair labor practice charge against the Respondent.

Tainted Decertification Petition

As set forth by the judge, an employer's unremedied general refusal to recognize and bargain with an incumbent union will be presumed to have caused, and thus tainted, any loss of employee support or expressions of employee disaffection for the union that arose during the course of such employer conduct. See *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177–178 (1996), enfd. in relevant part 117 F.3d 1454 (D.C. Cir. 1997). An employer can rebut this presumption only by showing that the loss of support or expressions of disaffection arose after the employer *resumed* its recognition of the union and bargained with it for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Id. at 178.

As the judge found, there can be no doubt that the Respondent generally refused to bargain with the Union between the dates of March 26 and April 19. The Respondent specifically notified the Union, in its March 26 letter, that it was putting everything "on hold," and that it was removing all offers from the table. I find it hard to imagine a clearer description of a general refusal to bargain. The Respondent only resumed bargaining after the Union filed an unfair labor practice charge alleging an unlawful refusal to bargain. That charge was dismissed, not on the grounds that the Respondent's conduct was lawful, but on the grounds that it would not effectuate the purposes of the Act to proceed because the Respondent had agreed to resume bargaining. Thus, presumably, the General Counsel would not have dismissed the charge if the Respondent had not agreed to resume bargaining, and the issue of the lawfulness of the Respondent's conduct would be before us. In my view, there can be no dispute that the Respondent engaged in an unlawful refusal to bargain.

The factual scenario is virtually identical to the facts in *Lee Lumber*, where the respondent refused to bargain with the union after a decertification petition was filed, but then agreed to bargain after the union filed an unfair labor practice charge alleging a violation of Section 8(a)(5).[4] Id. at 176. The Board presumed in that case that any expression of disaffection with the union raised subsequent to this refusal to bargain was tainted by the refusal, and held that any such disaffection would be presumptively tainted unless it arose after the parties bargained for a reasonable period of time after the resumption of bargaining. Id. at 177–178. Likewise, in this case, we must presume that the employee disaffection that led to the April 17 decertification petition was tainted by the Respondent's refusal to bargain, which was still ongoing at the time. The Respondent cannot rebut this presumption under the guidelines in *Lee Lumber*, supra, because the April 16 and 17 loss of support and expressions of disaffection incorporated in the April 17 decertification petition arose *before* the Respondent

[4] The only real difference between this case and *Lee Lumber* is that in *Lee Lumber* the employer's April 11–May 8, 1990 refusal to bargain that tainted the July 2, 1990 employee antiunion petition was found to be unlawful, in violation of Sec. 8(a)(5) and (1). The alleged unlawfulness of the Respondent's March 26–April 19 refusal to bargain that I find tainted the April 17 decertification petition in the instant case, on the other hand, was not litigated, because the Regional Director dismissed the Union's March 28 refusal to bargain charge following the Respondent's April 19 promise to resume bargaining. But the presumption that an employer's general withdrawal of recognition and refusal to bargain causes and taints a subsequent employee loss of support and expression of disaffection for a union does not depend on whether the withdrawal of recognition or refusal to bargain was found to be unlawful. Cf. *Wyndham Palmas del Mar Resort & Villas*, 334 NLRB 514 (2001), enfd. denied sub nom. *BPH & Co. v. NLRB*, 333 F.3d 213 (D.C. Cir. 2003) (decertification petition in Case 24–RD–424 was found under *Master Slack Corp.*, 271 NLRB 78 (1984), to be tainted by employer conduct tending to erode employee support for union, even though unfair labor practice charge alleging the conduct to be unlawful was resolved by informal Board settlement containing nonadmissions clause); *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998) (Board noted preliminarily that decertification petition was presumptively tainted by prior alleged unfair labor practices that were in derogation of the bargaining relationship, even though the unfair labor practice charge alleging the conduct to be unlawful was ultimately withdrawn by the union in conjunction with the parties' agreement on a new contract). And in any event, the General Counsel's refusal to issue a complaint on the 8(a)(5) charge in this case is certainly not tantamount to a finding that the Respondent's conduct was lawful.

agreed on April 19 to resume bargaining with the Union. Thus, the Respondent could not lawfully rely upon the tainted decertification petition in withdrawing recognition of the Union, and the Respondent violated Section 8(a)(5) and (1) of the Act in doing so.

Not a Reasonable Period of Time for Bargaining Prior to Withdrawal of Recognition

In addition, as seen, the Regional Director dismissed the Union's refusal to bargain charge on May 1 expressly because he determined that it would not effectuate the purposes of the Act to issue a complaint based on the March 28 refusal to bargain charge after the Respondent had notified the Union on April 19 that it was then ready to resume contract negotiations with the Union and that it was confident that it could bargain in good faith.

The judge found, and I agree with her, that the Respondent promised to bargain in good faith with the Union in order to induce the Regional Director to dismiss the refusal to bargain charge; that the Regional Director's dismissal of the charge was therefore in return for the Respondent's promise and thus constituted a unilateral settlement agreement of the charge by the Respondent; that by virtue of that settlement agreement the Respondent was under an obligation to bargain in good faith with the Union for a reasonable period of time following the Regional Director's dismissal of the Union's refusal to bargain charge; and that the Respondent withdrew recognition of the Union on June 1 without having satisfied that obligation, and thus violated Section 8(a)(5) and (1) in doing so.

The judge analogized the circumstances here to *Poole Foundry & Machine Co.*, 95 NLRB 34 (951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952) (when an employer has agreed to bargain as part of settlement of refusal to bargain charge, the employer is not permitted to challenge the union's majority status until a reasonable time for bargaining has elapsed), and *Lee Lumber*, supra (when a bargaining relationship has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed before the employer may question the union's representative status). The judge found as follows, based on the applicable principles set out and discussed in her decision:

> [The] Respondent undertook the obligation to bargain in good faith for less than two months, not a substantial amount of time given the lengthy hiatus, with an attendant failure to promptly provide all information requested by the Union. This was not a reasonable period of time for bargaining given that the parties were bargaining for an initial contract almost four years after the initial certification, the Union was not provided with statutorily relevant information in a timely manner, the parties were making significant progress toward reaching agreement, and no impasse in negotiations had been reached.

My colleagues find that the judge erred in extending settlement bar principles to the facts of this case. In their view, the Respondent did not enter into even an implied settlement agreement of the refusal to bargain charge. More specifically, my colleagues find that the judge drew speculative, factually unsupported inferences to support her findings that the Respondent promised to resume bargaining in good faith with the Union in order to induce the Regional Director to dismiss the refusal to bargain charge and that the Regional Director's dismissal of the charge was a quid pro quo for the Respondent's promise to resume bargaining.

I disagree with my colleagues' rejection of the judge's analysis. First, her finding that the Respondent promised to resume bargaining in good faith with the Union in order to induce the Regional Director to dismiss the refusal to bargain charge is based on a reasonable inference drawn from the sequence of events in question. Second, her finding that the Regional Director's subsequent dismissal of the refusal to bargain charge was thus in return for the Respondent's promise to resume bargaining is supported by the express language of the Regional Director's dismissal letter itself, as well as by the Regional Director's acknowledgment in the complaint. Third, the judge's finding that the Regional Director's dismissal of the charge in light of the Respondent's promise to resume bargaining in good faith was tantamount to a unilateral settlement agreement of the refusal to bargain charge by the Respondent is appropriate and warranted under the circumstances here.

First, the timing was very close, almost immediate, between (1) the April 17 filing of the decertification petition, (2) the Regional Director's April 19 notification to the parties that he was suspending the processing of the decertification petition because of the Union's pending March 28 refusal to bargain charge, and (3) the Respondent's April 19 notification to the Union that the Respondent stood ready to resume contract negotiations with the Union because the Respondent felt confident that it could continue to bargain in good faith.

In light of the above sequence, it is reasonable to infer a causal, not merely coincidental, relationship between the Regional Director's April 19 suspension of processing of the decertification petition in light of the Union's March 28 refusal to bargain charge against the Respondent, and the Respondent's same-day notification to the Union that it was ready to resume bargaining. Consistent

with the judge's reasoning, I infer from the timing of this sequence of events that the Respondent's assurance to the Union that it was *willing to bargain* was (1) motivated at least in part by the Regional Director's contemporaneous decision to suspend processing of the decertification petition pending resolution of the Union's charge that the Respondent was *refusing to bargain,* and (2) was intended to induce the Regional Director to dismiss the refusal to bargain charge and resume processing of the decertification petition. Even in the absence of direct evidence of such motivation and intent on the part of the Respondent, the Board is entitled to use simple logic to infer an object of the Respondent's conduct from the practical realities of the situation at hand.[5]

Second, the timing was similarly very close between (1) the Respondent's April 19 letter to the Union promising to resume bargaining and (2) the Regional Director's May 1 dismissal of the refusal to bargain charge expressly on the grounds that, in light of the Respondent's promise to resume bargaining, continued prosecution of the Union's refusal to bargain charge would not effectuate the purposes of the Act. Thus, the Regional Director himself makes it clear in his May 1 letter that he dismissed the refusal to bargain charge because the Respondent promised to resume bargaining. Further, in dismissing the refusal to bargain charge, the Regional Director acknowledged in paragraph 9(h) of the instant consolidated complaint that in light of the Respondent's expressed willingness to resume bargaining with the Union, it would not effectuate the purposes of the Act to issue a complaint based on that charge.[6]

My colleagues, nevertheless, would reject the above analysis because there is no direct, express evidence that the Respondent's promise to resume bargaining was the quid pro quo for the Regional Director's dismissal of the refusal to bargain charge. But, again, I find that such a quid pro quo understanding is reasonably inferred from the totality of the facts fully set forth above.[7]

Conclusion

In sum, I agree with the judge (1) that the Respondent could not lawfully rely on the tainted decertification petition in withdrawing recognition of the Union and that the Respondent violated Section 8(a)(5) and (1) of the Act in doing so, and (2), in the alternative, that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union on June 1 before bargaining in good faith with the Union for a reasonable period of time following the Regional Director's May 1 dismissal of the refusal to bargain charge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally transfer employees into the "installer" position without prior notice to the Machinists Automotive Trades, District Lodge 190, Local Lodge 1173, International Association of Machinists & Aerospace Workers, AFL–CIO and without affording the Union an opportunity to bargain with respect to the transfer and the effects of the transfer at a time when we are obligated to bargain with the Union regarding such transfers.

WE WILL NOT fail or refuse to provide the Union with unit employee classifications and wage histories and any other information requested by the Union that is relevant and necessary to the performance of its duties as the exclusive bargaining representative of unit employees at a time when we are obligated to provide such information.

[5] *Operating Engineers Local 150 v. NLRB*, 47 F.3d 218, 224 (7th Cir. 1995). See also *Enjo Architectural Millwork*, 340 NLRB 1340, 1350 (2003) (motive may be inferred from total circumstances proved, based on the Board's review of the record as a whole; Board may properly look to circumstantial evidence in determining motive).

[6] Finally, it is at least worth noting that, consistent with the Regional Director's May 1 dismissal letter, Union Chief Negotiator Dutton testified that the Union's unfair labor practice charge was dismissed "because we got back to the table." While no further direct evidence was introduced in corroboration of Dutton's testimony, no evidence was introduced to challenge or contradict it. On cross-examination, Dutton testified that, other than the Regional Director's May 1 letter dismissing the Union's refusal to bargain charge, he was unable to recall having had any communications of any sort with "the Board" (presumably meaning the Regional Office or the Office of the General Counsel in Washington) about the Board's intent or purpose in dismissing the Union's charge.

[7] See generally *Conn Fabricating & Engineering Co.*, 263 NLRB 946, 947 (1982) (union steward's speech to employees to clarify his role as steward, and specifically about three disciplinary warnings he had received, was made in return for employer's oral agreement to rescind written warnings, and creates inference that the steward's speech to employees was quid pro quo for employer's rescission of *all three* warnings).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

LEXUS OF CONCORD, INC.

Valerie Hardy-Mahoney, Esq., for the General Counsel.
John P. Boggs, Esq. and *David A Hosilyk, Esq. (Fine, Boggs, Cope & Perkins, LLP),* of Half Moon Bay, California, for the Respondent.
David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Charging Party.
Jesse Juarez, Organizer, Machinists Automotive Trades District Lodge 190, of Concord, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Oakland, California, on December 10, 11, and 12, 2001.[1] At issue is whether Respondent Lexus of Concord, Inc. violated Section 8(a)(1) and (5) of the Act[2] on June 1, 2001, by withdrawing recognition from Machinists Automotive Trades District Lodge 190, Local Lodge 1173, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union). The General Counsel claims that this withdrawal of recognition was unlawful (1) because it occurred while unremedied unfair labor practices existed,[3] (2) because the Respondent relied on a tainted showing of good-faith doubt of majority status,[4] and (3) because a reasonable period of time for bargaining had not elapsed between dismissal of a prior unfair labor practice case on May 1, 2001, and withdrawal of recognition 30 days later.[5]

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[6] and after considering the briefs filed by counsel for the General Counsel and for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a California corporation with an office and place of business in Concord, California, where is engaged in the retail sale and service of new and used automobiles. During the 12-month period ending October 26, 2001, Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 which originated outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES—FACTS

A. Background

Pursuant to a Board election held on August 1, 1997, in Case 32–RC–4321, on August 11, 1997, the Union was certified as the exclusive collective-bargaining representative of the following appropriate unit of employees:

> All full-time and regular part-time technicians, parts department employees, including parts drivers, and detailers, employed by Respondent at its Concord, California facility; excluding sales employees, all other employees, office clerical employees, service and parts managers, guards, and supervisors as defined in the Act.

By virtue of Section 9(a) of the Act, since August 1, 1997, the Union has been the exclusive representative of the unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On April 27, 1999, Respondent withdrew recognition from the Union and ceased bargaining for an initial collective-bargaining agreement. On April 28, 2000, the Board issued a Decision and Order in *Lexus of Concord,* 330 NLRB 1409 (2000), ordering Respondent, inter alia, to recognize and bargain with the Union as the representative of the unit employees.

B. Bargaining Subsequent to Decision and Order

On or about September 26, 2000, Respondent resumed bargaining with the Union for an initial collective-bargaining agreement pursuant to the Board's April 28, 2000 Order in

[1] The charge in Case 32–CA–18925–1 was filed by the Union on June 6, 2001. The charge in Case 32–CA–19003–1 was filed by the Union on July 16, 2001. The consolidated complaint was issued October 26, 2001.

[2] Sec. 8(a)(1) forbids an employer from interfering with, restraining, or coercing employees in the exercise of their rights, guaranteed in Sec. 7 of the Act, to bargain collectively through representatives of their own choosing. Sec. 8(a)(5) proscribes an employer's refusal to bargain collectively with the representative of its employees.

[3] The General Counsel alleges these unfair labor practices are: (1) on or about October 23, 2000, Respondent created the position "Used Car Prep-Administrative Position" in order to divert bargaining unit work and without bargaining with the Union; (2) on or about March 2, 2001, Respondent promoted a detailer to an apprentice "installer" position without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the promotion and the effects of the promotion in violation of Sec. 8(a)(1), (5), and (3) since about April 24, 2001, Respondent has failed to provide the Union with information in a timely manner in violation of Sec. 8(a)(1) and (5).

[4] The General Counsel alleges that Respondent relied on the signatures used in support of the petition in Case 32–RD–1377 and that these signatures were collected on April 17, 2001, following Respondent's March 26, 2001 refusal to bargain further with the Union.

[5] Counsel for the General Counsel relies on *Poole Foundry and Machine Co.,* 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952); and *Liberty Fabrics, Inc.,* 327 NLRB 38 (1998).

[6] Credibility resolutions have been made based on a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

Lexus of Concord. Respondent utilized the services of a new labor attorney, John Boggs.[7] Boggs met with Dutton and other union representatives in July 2000, in order to introduce himself and go over the prior progress of negotiations. Thereafter, the parties held five bargaining sessions concluding with a session on February 20, 2001. Boggs was Respondent's chief spokesperson at all of these sessions.

At the bargaining session on February 20, 2001, the major issues remaining were employee eligibility to participate in the Company or the Union's pension plans, medical copayments or maintenance of benefits, and the term of the contract. At that meeting, Mark Hollibush, business representative for the Union, proposed a 2-year term for the contract, break-in rates of $75 now, $75 in 6 months and $25 during the second year of the contract. Hollibush furthered proposed that employees have the option to participate in either the Company or the Union's pension plans, that there be a $20-copayment during the first year of the contract and maintenance of benefits with no copayment during the second year. Finally, Hollibush requested the prior agreement of a 60-cent wage increase be adhered to in June 2001. The parties tentatively agreed to language on vacation pay and recall from layoff. Several caucuses and sidebars occurred. Hollibush asked for another bargaining date. Boggs told Hollibush that he thought the parties were close to an agreement and they could work out the details by telephone.

In early March correspondence to Hollibush regarding the pension issue, Boggs proposed that the parties meet again. He stated that his first available date was March 27. Hollibush did not respond to Boggs regarding the meeting date.

On March 26, 2001, Respondent refused to bargain further with the Union. By letter of that date, Respondent, through Boggs, indicated that it had received information that a large number of unit employees no longer desired union representation and these employees were going to file a decertification petition with the NLRB.[8] Respondent announced that it was "put[ting] everything on hold" and "removing all offers from the table."

On March 28, 2001, the Union filed an unfair labor practice charge against Respondent in Case 32–CA–18811 alleging, inter alia, that Respondent violated Section 8(a)(1) and (5) by its refusal to bargain further with the Union on March 26, 2001.

C. Decertification Petition

On April 17, 2001, a decertification petition was filed in Case 32–RD–1377. It was supported by a showing of interest signed on April 16 and 17, 2001, by 21 individuals. The individuals signed beneath the typewritten words, "We the undersigned employees of Lexus of Concord no longer wish to be represented by Machinists District Lodge 190, Local 1173." Various of these individuals testified that they signed the decertification petition because they understood that the Union was close to completing an agreement with Respondent and these employees did not like the terms of that agreement. These conversations occurred from as early as December 2000, to as late as February and March 2001.

D. Resumption of Bargaining

On about April 19, 2001, Respondent indicated in writing that it was prepared to resume bargaining with the Union. On May 1, 2001, the Regional Director for Region 32 determined that it would not effectuate the purposes of the Act to issue a complaint in Case 32–CA–18811 because, although the charge was meritorious, it now appeared that Respondent was willing to resume bargaining. The Regional Director noted that Respondent has reaffirmed its recognition of the Union, and its obligation to continue bargaining with it, has recommitted itself to tentative agreements reached to date in bargaining, and has agreed to meet with union negotiators on May 4, 2001.

E. Information Request

Prior to resuming bargaining, on or about April 23 or 24, 2001, Vernon Dutton, area director of Local Lodge 1173 and the Union's chief negotiator with Respondent, requested information regarding wages, classifications, and benefit packages for unit employees from Respondent's attorney, John Boggs. According to Dutton, Boggs responded that he would provide this information. Dutton requested that Jesse Juarez, union organizer, e-mail the request for information to Boggs as well. Juarez sent a confirming e-mail to Boggs dated April 24, 2001, stating, "We are requesting an updated bargaining unit employee list, with hire date, classifications, current wages, and wage history within the last four years and current addresses, phone numbers."

F. Bargaining Session of May 4, 2001

Thereafter, on May 4, 2001, Respondent and the Union met at about 9:30 or 10 a.m. for purposes of resuming negotiations for an initial agreement. Present at the meeting were Hollibush, Juarez, Dutton, Union Steward Steve Older, John Boggs, and Greg Schiller, general manager of Respondent. The parties discussed many issues at this meeting. For instance, before breaking for lunch, the parties discussed whether unit employees could participate in the union pension plan as well as voluntarily participate in Respondent's 401(k) plan. Wages were also discussed. The Union stated it wanted to calculate some retroactive increases dependent on pension, health and welfare and other economic issues and was thus rescinding its prior agreement to 60-cent wage increases in June of each year. Schiller asked if this meant he could not give the wage increase and Dutton responded that he would not be able to do so.

Following the meeting on May 4, Respondent's Attorney Boggs sent Dutton a letter dated May 5, 2001, summarizing the events of May 4. Although Dutton disagreed with some of the statements in this letter, he did not respond to it. Two further meeting dates were set in May but subsequently cancelled by Respondent's attorney, Boggs.

G. June 1, 2001 Withdrawal of Recognition

On June 1, 2001, Respondent, through its attorney Boggs, withdrew recognition from the Union based on its good-faith doubt of majority status; a petition signed by 21 unit employees stating that they no longer desired to be represented by the Un-

[7] Respondent has denied that Boggs is an agent within the meaning Sec. 2(13) of the Act.

[8] In fact, Respondent received a petition signed by 21 employees stating, "We . . . wish to discontinue all negotiations and contact with the Union. . . . We, the undersigned, wish to have the National Labor Relations Board end all negotiations concerning this matter."

ion. Respondent relied on *Levitz Furniture Co.,* 333 NLRB 717 (2001), as authority for withdrawal of recognition.

H. Across-the-Board Wage Increase

Prior to the March 26, 2001 cessation in bargaining, the parties reached a tentative agreement that employees would receive a 60-cent wage increase in May or June of each year. This tentative agreement was implemented in May or June 2000. After the parties resumed bargaining on May 4, 2001, the Union indicated that it was rescinding its tentative agreement to the wage increase. Nevertheless, Respondent granted the across-the-board wage increase in early June 2001. Respondent did not notify the Union that it intended to grant the wage increase nor did it afford the Union an opportunity to bargain regarding the effects of the wage increase. The wage increase relates to wages and rates of pay and is a mandatory subject for the purposes of collective bargaining.

I. Dismissal of Decertification Petition

By letter of July 20, 2001, the Acting Regional Director for Region 32 dismissed the decertification petition in Case 32–RD–1377. Specifically, the letter announced,

> The investigation revealed that the showing of interest signatures in support of the petition were dated April 16 and April 17, 2001. The signatures were solicited and obtained during a period commencing on March 16 [probably a typographical error and should be 26], in which the Employer had refused to bargain with the incumbent collective bargaining representative, Machinists Lodge 190. The refusal to bargain predated that gathering of signatures for the petition, thus giving a presumption that the decertification effort was influenced by the alleged misconduct. Further, this alleged misconduct was in the derogation of the bargaining relationship. In such circumstances, a petition will not be processed. See *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998).

J. Response to Information Request

The Union orally and by e-mail requested wage information prior to commencing bargaining in the spring of 2001. Specifically, as set forth in its e-mail to Boggs dated April 24, 2001, the Union requested the names, addresses, phone numbers, hire dates, classifications, current wages and wage history of unit employees over a 4-year period. This information was not provided in its entirety at the negotiating meeting held on May 4, 2001. Rather, the Respondent produced an employee list, including addresses, phone numbers, and job classifications. By e-mail of April 30, 2001, Juarez told Boggs that, "if it's going to be a hardship for your client to provide all of our info request[s], I would then propose that your client provide everything other than wage history. . . . We would still like wage history at a later date." The Union noted the absence of wage history and complained at the May 4 meeting that the information request was not responded to completely.

On June 1, 2001, when the Respondent withdrew recognition from the Union, it had not provided the Union was the classifications and wage histories of unit employees. The Union received the completed information from the NLRB in October 2001. This information was compiled in late May 2001.[9] Juarez admitted that the Union had requested and received from Respondent the same information in August 2000. He stated that in pursuing the 2001 information request,the Union wanted a 4-year survey accurate as of April 2001 in order to verify correctness of prior information[10] and to monitor changes since August 2000.

K. Hiring and Transfer of David Burman

When Juarez initially organized the unit employees in 1997, Dave Burman was a detailer. Detailers are hourly paid employees and receive part of a bonus pool at the end of each month based on the number of cars serviced. Burman left Respondent's employ from approximately 1998 to 2000 to serve in the U. S. Marine Corps. Upon completion of his duty, he reapplied for a position with Respondent as a detailer or for any other job. At the negotiation meeting on May 4, 2001, Juarez received the employee list which indicated that Burman was working as an installer.[11] By e-mail of May 11, 2001, Juarez requested a copy of Burman and other employees' compensation plans.

Bruce Lichti, master technician, observed Burman in 1997 when he performed detailer duties including washing, waxing, vacuuming cars, and shuttling customers. Burman ceased to work for Respondent at some point and then returned in the fall or winter of 2000, performing what appeared to Lichti to be detailer work. Lichti could not estimate the number of cars Burman washed each day and admitted that he did not observe Burman constantly. Jhan Jesus Hernandez, senior technician, spoke with Burman about his duties upon Burman's return in October 2000. Burman told Hernandez he was performing detailing work exclusively in the used car department. Hernandez observed Burman cleaning glove boxes, placing placards on cars, and buffing cars.

Respondent's records indicate that in October 2000 Berman was hired in a used car preparation job at $12 per hour. About January 25, 2001, his title was changed to administrative position in used car preparation at $13.50 per hour. After reviewing this evidence in subpoenaed documents received on the day of this hearing, counsel for the General Counsel moved to amend the complaint to add an allegation that Respondent committed a unilateral change by creating the position on or about October 23, 2000, of used car prep-administrative position. Respondent denied this allegation and objected to the late amendment of the complaint. I requested that the parties brief the issue of

[9] The run date on the document indicates it was printed on May 21, 2001. However, the witness credibly testified that once she created a document, the computer was not set to automatically update the document. Accordingly, although she believes that she may have worked on the document for up to 4 days, the date shown on the document was nevertheless May 21, 2001. Moreover, after compiling the document, she sent it to Respondent's attorney who reviewed it and suggested corrections or changes.

[10] The Union had heard rumors that other changes were being made.

[11] Juarez testified on direct that he thought he learned this information in February 2001. However, on cross-examination, after reading an affidavit he gave to the NLRB, he agreed that he learned about Burman's employment status on May 4, 2001, when he received the Respondent's partial response to the April 24, 2001 information request.

whether the complaint should be amended to add this allegation.

In any event, there is no dispute that the Union was not informed about either Burman's hire or Burman's placement in an administrative position and was not afforded an opportunity to bargain regarding these decisions or the effects of these decisions.

On March 2, 2001, Burman was transferred from the position of "used car detail"[12] to the position of "lube and installer" at an hourly rate of $13.60. He was given subsequent hourly rate increases on May 5 to $14.20, and August 16, 2001, to $16.20. On October 4, 2001, Burman was changed to a flat rate of $16.20 per hour. In early spring of 2001, Lichti and master technician Jhan Jesus Hernandez, observed that Burman's duties had changed to what was called in the shop, interchangeably, an installer, apprentice, or lube man. In this position, Lichti and Hernandez observed Burman working with tools performing brake jobs, 7500, 15,000 and 30,000 mile services, taking apart door panels, changing window regulators, disassembling part of the dash, changing out radios and other work they considered mechanic's work.

According to Christine Carvalho, custodian of records, who has worked for Respondent for 7 years, Respondent has always attempted to transfer employees from within whenever possible. During bargaining in September 2000, it was called to the Union's attention that two individuals were working in apprentice positions, a newly created position. The Union agreed to allow these individuals to remain in the positions but stated that if any new employees were to be considered for this job, Respondent must bring it to the table. Respondent disagreed and stated it had no duty to bargain about such promotions. There is no dispute that the Union received no notice regarding Burman's transfer from "used car detailer" to "installer" and was afforded no opportunity to bargain regarding the transfer or the effects of the transfer.

III. ALLEGED UNFAIR LABOR PRACTICES—ANALYSIS

A. Agency Status of Respondent's Labor Attorney

The consolidated complaint was amended at the hearing to add an allegation that Respondent's labor attorney, John Boggs, was an agent of Respondent within the meaning of Section 2(13) of the Act.[13] Respondent denied this allegation. In determining agency status, the Board utilizes the common law of agency. Thus actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Restatement 2d, Agency § 27.

In the presence of Respondent's general manager, an admitted agent and supervisor of Respondent, Boggs acted as chief spokesperson for all communications with the Union and for all negotiation sessions with the Union. Boggs spoke to the NLRB on behalf of Respondent and he authored letters and pleadings to the NLRB on behalf of Respondent. Under these circumstances, there can be no doubt that Boggs was an agent of Respondent within the meaning of Section 2(13) of the Act.[14]

I find that Boggs was the agent of Respondent within the meaning of Section 2(13) for purposes of labor relations negotiations, dealing with the Union, and handling legal matters with the NLRB. See, e.g., *V & S ProGalv,* 323 NLRB 801, 803 (1997), enfd. 168 F.3d 270 (6th Cir. 1999) (attorney who represented employer before NLRB and acted as chief negotiator was agent within meaning of Section 2(13) of the Act); *Contemporary Guidance Services,* 291 NLRB 50, 64 (1988), enfd. 140 LRRM 2886 (2d Cir. 1990) (attorney who represented employer before NLRB and acted as chief negotiator was agent within meaning of Section 2(13) of the Act.).

B. October 23, 2000 Creation of "Used Car Prep-Administrative Position and Placing Burman in this Position to Perform Bargaining Unit Work Without Bargaining With the Union

The General Counsel asserts that Respondent created a new position, "used car prep-administrative position," when it hired David Burman in October 2000 to work in the used car department. General Counsel asserts that Respondent was really diverting bargaining unit work (detailing) from unit employees to a new position in the used car department.

The record does not support this assertion. Rather, Noor Asad, Respondent's used car manager, testified that he was the used car assistant, the same job that Burman was hired in October 2000 to perform, prior to becoming used car manager. Asad, who had been used car manager for about 3 years at the time of the hearing, was not a member of the bargaining unit when he was the used car assistant and, as used car assistant, he was not allowed to attend one preelection union meeting which he sought to attend. He attempted to vote in the election and his vote was challenged.

The majority of Burman's work was not detail work. However, when a detailer brought a used car to Burman, on occasion the car was not perfectly detailed. For instance, if the trunk was still dirty after the car was returned, Burman vacuumed it. If there was a scratch that needed to be buffed out, Burman touched it up. Occasionally he performed complete detailing on used cars. Additionally, Burman parked the used cars on the used car lot. Burman's other duties consisted of "stocking in" the recently arrived used cars, conducting daily inspections on the used cars and noting any deficiencies. Burman reported these deficiencies to the detail department to take care of them. He did this by providing a list of all the used cars that needed detail work on the lot to Marco, the detail manager. After working without a uniform for some period of time, Burman began wearing the same uniform that was worn by em-

[12] Other corporate records do not use the prior position of Burman as "used car detail." Rather, he is called "used car preparation" or "used car prep-administrative position." Whatever his position was called, it is apparent that at least a part of his duties included washing, waxing, buffing, and vacuuming used cars.

[13] Sec. 2(13) of the Act provides, "In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." This section was added in 1947 in order to apply the common law rules of agency in determining agency status.

[14] I also note that although Respondent denied this allegation in the pleadings, no argument is set forth in Respondent's brief, authored and submitted by Boggs, to the contrary.

ployees in the detail department. Asad did not give Burman the uniform or ask him to wear it.

Burman utilized the internet to advertise the used cars for sale. He entered car descriptions and dealer information. Burman's "stocking-in" duties included issuing a stock number, logging the car into the business office log book, entering the vehicle information in order to access an internet blue book value and placing this with a buyer's guide on the window of the car. Burman also interacted with vendors who came to the dealership to repair rock chips on windows, paint bumpers, clean carpets, and perform other body work. Additionally, Burman completed admission slips for all cars that were being sent to auction by the dealership and coordinated with the auction drivers to insure that the correct cars were sent to auction.

Various service employees observed Burman while he worked in the "used car prep-administrative position." For instance, Bruce Lichti, master mechanic, observed Burman during October and November 2000,[15] washing and waxing cars and shuttling customers back and forth. Lichti could not give an estimate for the number of times he observed Burman washing cars or performing other detail work. He had no idea how many cars Burman washed each day. Some of the detail work, the washing, is performed in the service area and some of it is performed away from the service area. Lichti had only occasional opportunity to observe work outside the service area.

"Sometime last year," Senior Technician Jhan Jesus Hernandez spoke to Burman about Burman's duties in the used car department and Burman told Hernandez he was a detailer assigned to used cars. Hernandez did not observe Burman's movements regularly. However, he saw Burman placing patch stickers on windows, clearing out glove boxes, buffing cars, moving cars in the used car lot, and from time-to-time washing and vacuuming cars.

Based upon this evidence, I do not find a classification change as alleged in the amendment to the complaint. No new position was created in October 2000 when Burman was hired in the "used car preparation job," changed to "used car preparation-administrative position" in January 2001. It is unrefuted that this was the same position that Noor Asad previously occupied before becoming used car manager. Accordingly, I do not find that a new job was created when Burman was hired.

Moreover, I do not find that placement of Burman in this position required bargaining with the Union in that there was no loss of bargaining unit work in assignment of Burman to perform the work of used car preparation. This work had previously been performed by Asad who was not a member of the bargaining unit. Burman was not a member of the bargaining unit at the time he was placed in this position. Rather, he was unemployed, having just returned from military duty. There is no evidence that he retained his status as an employee of Respondent during his military term.

Finally, I conclude that Burman was not performing detail work as performed by bargaining unit employees. I credit Burman's thoughtful, detailed testimony. Although he may have described his work to Hernandez as "detail" work assigned to used cars,[16] and although one of Respondent's memoranda recorded Burman's transfer from "used car detail" to "Lube and Installer," the conclusory description of "used car detail" is not as probative of Burman's actual duties as the details which he provided.[17] I find that Burman's duties were associated with the used car department and sales of used cars rather than detailing of used cars. The used car sales employees are not part of the bargaining unit.

C. March 2, 2001 Transfer of Burman From Used Cars to Position of Installer

On March 2, 2001, Burman was transferred from the position of "used car detail" to "lube and installer" and given a pay raise from $13.50 to $13.60 per hour. The Union had previously agreed to the creation of the installer category as a bargaining unit position. However, the Union expressly noted that it was not relinquishing any right to bargain with Respondent regarding placement of future employees in this position.

There is no dispute that Respondent failed to notify the Union regarding the transfer of Burman into the bargaining unit. Counsel for the General Counsel argues that promotion of employees is a mandatory subject of bargaining, relying on *Denver Post Corp.,* 328 NLRB 118, 124 (1999) (promotion of apprentices to pressmen is mandatory subject of bargaining).

Respondent argues that although promotion of employees within the bargaining unit may be a mandatory subject of bargaining, when the promotion does not result in the loss of bargaining unit positions, there is no duty to bargain, citing *St. Louis Tel. Employees Credit Union,* 273 NLRB 625, 628 (1984). Respondent argues that it simply filled a vacancy in the bargaining unit with no resulting change in terms and conditions of employment. Respondent notes that by placing Burman in the bargaining unit, it actually increased bargaining unit work and followed its past practice of filling open positions from within its own organization.

Typically, transfer of bargaining unit work to nonunit individuals is a mandatory subject of bargaining if it has an impact on unit work. *Regal Cinemas, Inc.,* 334 NLRB 304 (2001), citing *Land O'Lakes, Inc.,* 299 NLRB 982, 986–987 (1990); and *Hampton House,* 317 NLRB 1005 (1995). In this case, by virtue of the unilateral addition of Burman to the bargaining unit, bargaining unit work was transferred from higher paid unit employees to a lower paid unit classification. Thus, an impact on bargaining unit work that is, technicians' work; took place. By transferring Burman into the bargaining unit, work was transferred from the bargaining unit technicians to the newly created, lower-paying bargaining unit position of installer. Failure to afford the Union timely notice and an opportunity to bargain regarding the transfer of Burman into the bargaining unit position violates Section 8(a)(1) and (5) of the Act. See, e.g., *United Technologies,* 296 NLRB 571, 572 (1989) (transfer of unit employee from one facility to another without bargain-

[15] Lichti was not present at the dealership beginning in December 2000.

[16] Generally, both Lichti and Hernandez were credible witnesses. However, their testimony with regard to Burman's duties was flawed in that they both were unable to observe his work on more than a sporadic basis.

[17] By analogy, job titles are not binding in determining 2(11) status.

ing with Union constituted violation of Section 8(a)(1) and (5)). I also note that the position of installer was unilaterally created by the Respondent and later approved by the Union with the caveat that the Union wanted to be advised of any further additions to the installer ranks.

D. Information Request

It is undisputed that Respondent failed to provide the Union with all of the information requested by the Union on April 24, 2001. Specifically, the Union requested the names, addresses, phone numbers, hire dates, classifications, current wages and wage history of unit employees over a 4-year period. This information is presumptively relevant. Respondent failed to provide wage histories or employee classifications.

Although Respondent does not dispute that it failed to provide the wage histories and employee classifications at or before the May 4 bargaining session, the next session following the information request, Respondent notes that it was assembling this information but did not complete the review process prior to withdrawal of recognition.

I find that by failing to provide the Union in a timely manner with the wage histories and employee classifications, Respondent violated Section 8(a)(1) and (5) of the Act.

E. Withdrawal of Recognition

Three alternative theories are advanced in the complaint regarding Respondent's withdrawal of recognition on June 1, 2001.

F. Withdrawal Notwithstanding the Existence of Unremedied Unfair Labor Practices

General Counsel contends that Respondent was not privileged to withdraw recognition on June 1, 2001, because there were outstanding unremedied unfair labor practices at that time. These outstanding, unremedied unfair labor practices include, according to General Counsel, Respondent's failure to bargain regarding the classification change of Burman in October 2000, which I have found to be lawful, and failure to bargain regarding the transfer of Burman in March 2001, which I have found to be unlawful.[18]

As counsel for the General Counsel notes, there must be a causal connection between the outstanding, unremedied unfair labor practices and withdrawal of recognition in order to find that the withdrawal violated the Act. Factors which are considered in determining whether such a causal connection exists, as set forth in *Williams Enterprises,* 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995), include (1) the length of time between the unfair labor practices and the withdrawal of recognition, (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees, (3) the tendency of the violation to cause employee disaffection, and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union.

Counsel for the General Counsel contends that the transfer of Burman to the bargaining unit position of installer was close in time to the date of withdrawal. She argues that the nature of this violation was such as to cause a detrimental or lasting effect with a tendency to cause employee disaffection. Specifically, counsel notes that transfer of Burman into the bargaining unit caused a diminution in work available for flat rate technicians. Counsel argues that these actions tended to reduce employee morale and undermine support for the Union.

Counsel for Respondent asserts that Burman was hired as an installer because there were not enough technicians to handle the workload. Accordingly, there was no loss of technician bargaining unit work and no impact on the bargaining unit. Counsel also asserts that Respondent was not required to bargain over placing Burman in the installer position because it was simply filling a vacancy in the bargaining unit by following its past practice of attempting to fill open positions from within the company.[19]

In agreement with counsel for the General Counsel, I find failure to bargain regarding the transfer of Burman into the installer position in the bargaining unit tainted the withdrawal of recognition. The transfer occurred on March 2, 2001—about 6 or 7 weeks before the April 16 and 17, 2001 signatures were gathered. The transfer of Burman into the unit conveyed to employees the premise that Respondent was free to apportion work as it pleased and could eliminate overtime or other technician work by unilaterally hiring cheaper help. It does not require a leap in logic to conclude that such action on the part of Respondent would tend to cause employees to believe that the Union was powerless to assist them. Accordingly, I find that withdrawing recognition was tainted by the presence of the unremedied unfair labor practice.

G. Withdrawal Based on Signatures Collected While Respondent Was Refusing to Bargain With the Union

As previously noted, Respondent suspended bargaining with the Union on March 26, 2001, and did not agree to resume bargaining until April 19, 2001. Signatures in support of a

[18] Although the complaint relies upon failure to timely produce all of the requested information, counsel for the General Counsel has not included the information request as an unremedied unfair labor practice which would preclude withdrawal of recognition. I am inclined to agree with her. The Respondent relies upon the showing of interest of April 16 and 17, 2001, in its withdrawal of recognition on June 1, 2001. The request for information was issued April 24 and repeated April 30. Accordingly, the information request postdated the employees' signatures.

[19] During the hearing, I allowed Respondent to present evidence regarding employees' statements contemporaneous with signing the showing of interest on April 16 and 17. Counsel for the General Counsel maintained a continuing objection to this employee testimony regarding disaffection with the Union. However, Respondent did not present evidence of statements contemporaneous with the April 16 and 17 showing of interest. Rather, Respondent presented testimony that employees expressed dissatisfaction with the Union since December 2000, and had frequent discussions centered around concern that the Union and Respondent were about to execute an unsatisfactory contract. This concern culminated in an employee petition of March 26, 2001. I reject this testimony as it relates to a showing of interest that predated Respondent's agreement to return to the bargaining table. Accordingly, I also reject Respondent's additional argument that employees were dissatisfied with the Union long before Burman was transferred into the bargaining unit by virtue of a petition of March 26, 2001, that 21 unit employees wanted all negotiations and contact with the Union discontinued.

decertification petition were gathered on April 16 and 17, 2001. Then on June 1, 2001, Respondent withdrew recognition from the Union.

Counsel for the General Counsel asserts that by suspending negotiations on March 26, 2001, Respondent engaged in a general refusal to bargain. Counsel argues that in cases where withdrawal of recognition is tainted by a general refusal to bargain, it is unnecessary to prove a causal connection between the refusal to bargain and the subsequent disaffection of employees. Counsel cites *Lee Lumber & Building Material Corp. (Lee Lumber I),* 322 NLRB 175, 178 (1996), affd. in relevant part 117 F.3d 1454 (D.C. Cir. 1997).

Counsel for Respondent argues that Respondent did not withdraw recognition on March 26, 2001. Rather, Respondent relies on the explicit wording in its letter of March 26, 2001, that it was putting everything on hold and removing all offers from the table. Respondent also notes that at least one of the union negotiators, Hollibush, did not read Respondent's letter as indicative of a withdrawal of recognition.

After Respondent's letter of March 26, 2001, putting everything "on hold," a showing of interest was gathered on April 16 and 17, 2001. This showing of interest was indeed gathered during the time that Respondent put its relationship with the Union "on hold." Accordingly, if by placing negotiations "on hold," Respondent was refusing to bargain with the Union, there is no need to establish a causal connection.

I find that by Respondent's letter of March 26, 2001, it generally refused to bargain with the Union. I find that the wording of the letter is tantamount to a withdrawal of recognition. See, e.g., *Bridgestone/Firestone, Inc.*, 337 NLRB 133 (2001) (withdrawal of bargaining offer due to erroneous view that employer was no longer permitted to bargain with union due to a petition signed by majority of unit employees constitutes cessation of bargaining in violation of Section 8(a)(1) and (5)); *Lee Lumber Co. (Lee Lumber II),* 334 NLRB 399, 406 (2001) (refusal to bargain based on decertification petition constitutes violation of the Act); (*Wyandanch Engine Rebuilders, Inc.,* 328 NLRB 866, 877 (1999) (fax indicating that union no longer permitted on property together with fax indicating, "There is No Union here," constitute withdrawal of recognition); *Exxel-Atmos, Inc.,* 309 NLRB 1024 fn. 1, 1029 (1992), review denied, case remanded 28 F.3d 1243 (D.C. Cir. 1994) (refusal to meet with full bargaining committee to engage in any formal negotiations unless and until employees voted in an election constitutes withdrawal of recognition); cf. *Massey-Ferguson, Inc.,* 184 NLRB 640, 644 fn. 6 (1970), enfd. 78 LRRM 2289 (7th Cir. 1971) (brief suspension of bargaining in order to obtain legal advice regarding impact of decertification petition was reasonable).

Respondent was not entitled to rely on the statements of employees in April 2001 to prove the Union's lack of majority status or its good-faith doubt of that status if Respondent's March 26, 2001 statements regarding putting everything on hold and withdrawal of all offers on the table are tantamount to withdrawal of recognition. I find that Respondent's March 26, 2001 statements and subsequent actions constituted a general refusal to bargain. The fact that Respondent withdrew all offers from the table informs construction of the prior statement putting negotiations "on hold." If NLRB advice was really what was necessary for Boggs in these circumstances, a brief hiatus might be understandable. But when viewed in the context of removing all offers from the table, the lengthy hiatus must be seen as a general refusal to bargain. Thus, the signatures gathered during the suspension of negotiations may not be relied upon as a basis for withdrawal of recognition. Accordingly, *Levitz,* 333 NLRB 717 (2001), relied on by Respondent, is inapplicable. The analysis in *Levitz* "is limited to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions." *Levitz,* 333 NLRB at fn. 1.

H. Withdrawal Notwithstanding That a Reasonable Period of Time Had Not Elapsed Between the May 1, 2001 Merit Dismissal in Case 32–CA–18811–1, and the June 1, 2001 Withdrawal of Recognition, Within the Meaning of Poole Foundry & Machine Co., 95 NLRB 34 (1951), and Liberty Fabrics, Inc., 327 NLRB 38 (1998)

As counsel for the General Counsel notes, no valid question concerning recognition may be raised after settlement of a refusal to bargain charge until a reasonable period of time for bargaining has passed. Counsel relies on *Poole Foundry &Machine Co.,* 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952); and *Liberty Fabrics, Inc.,* 327 NLRB 38 (1998). Counsel concedes that there was no traditional settlement in this case. However, counsel urges that the rationale of *Poole Foundry* applies herein by reference to *Liberty Fabrics,* supra, in which the Board extended the rationale of *Poole Foundry* to a settlement between a union and employer which did not involve the Board. The Board dismissed the unfair labor practice charge pursuant to the non-Board agreement between the union and the employer. When the employer subsequently withdrew recognition, the analysis of *Poole Foundry* was applied to determine whether the employer had bargained for a reasonable period of time prior to withdrawal of recognition.

Looking at the events between May 1, 2001 (when the Regional Director for Region 32 dismissed the unfair labor practice regarding the events of March 26, 2001), and June 1, 2001 (when Respondent withdrew recognition), counsel for the General Counsel points out that only one bargaining session occurred. During this session, the Union was given some but not all of its requested information. The parties discussed several open issues including the pension issue and the Union proposed a compromise on that issue. Clearly, counsel argues, this single bargaining session, which in itself gave rise to refusal to timely provide all of the requested information, does not establish that bargaining has taken place for a reasonable period of time, argues counsel. Finally, counsel asserts that Respondent may not take advantage of events predating its withdrawal of recognition on March 26, 2001. Counsel asserts, accordingly, that Respondent may not seek to add the period from September 2000 through March 2001 to the period of May 1 to June 1, 2001, in order to determine whether a reasonable period of time has elapsed. Counsel relies on *Shangri-La Health Care Center,* 288 NLRB 334 (1998).

Respondent argues that *Poole Foundry* and *Liberty Fabrics* are far different than the facts in this case. Initially, Respondent notes that its letter of March 26 did not withdraw recognition. Rather, the letter clearly stated that Respondent was suspending bargaining indefinitely pending consultation with the Board regarding the employee petition. Secondly, Respondent notes that no settlement occurred. Rather, after unilaterally suspending negotiations, Respondent unilaterally resumed negotiations. Respondent did not speak to the Union before deciding to resume negotiations and there was no agreement between Respondent and the Union regarding resumption of negotiations. In conclusion, Respondent urges that the Regional Director is attempting to transform dismissal of a charge into an affirmative bargaining order without agreement by the parties.

In *Douglas-Randall, Inc.,* 320 NLRB 431 (1995), the Board overruled *Passavant Health Center,* 278 NLRB 483 (1986), and held that a settlement agreement containing a bargaining provision requires dismissal of a decertification petition filed prior to the settlement agreement but after the onset of alleged unfair labor practices. The Board relied upon the Fourth Circuit's rationale in *Poole Foundry & Machine Co. v. NLRB,* 192 F.2d 740 (1951), cert. denied 342 U.S. 954 (1952), enfg. 95 NLRB 34 (1951). In *Poole*, the court noted the distinction between a settlement agreement and a dismissal of the charges. 192 F.2d at 742. Much of the rationale for the decision in *Poole* is based upon the mutual undertakings of the parties in entering into a voluntary settlement agreement to bargain in good faith. *Liberty Fabrics,* supra, extended this rationale to private settlement agreements.

Respondent correctly asserts that no settlement agreement (Board or non-Board) exists in this case. Nevertheless, counsel for the General Counsel argues that the unfair labor practice charge was dismissed only because Respondent had voluntarily undertaken to resume its obligations to recognize and bargain with the Union in good faith. Counsel denotes such action as a "merit dismissal." In arguing for extension of the duty to bargain for a reasonable period of time following a "merit dismissal," counsel notes that the Board stated in *Lee Lumber I,* supra, 322 NLRB at 178, in referring to *Poole*,

> The common thread running through these decisions is that when a bargaining relationship has been initially established, or has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed before an employer may question the union's representative status.

The Board's Casehandling Manual for Unfair Labor Practices, Section 10122.1, notes that "strictly speaking, an unfair labor practice is 'dismissed' . . . when the Regional Director . . . refuses to institute formal proceedings. . . . Thus, a case should be dismissed in the absence of ground for formal proceedings." The manual then enumerates seven bases for dismissal of an unfair labor practice charge at Section 10122.2 including, "Formal proceedings will not effectuate the purposes of the Act (covers isolatedness, policy determinations)" and "'Unilateral' settlement agreement effectuating purposes of the Act."

I conclude that the merit dismissal at issue herein is such a "unilateral" settlement agreement effectuating the purposes of the Act, in that Respondent undertook to negotiate in good faith with the Union in order to obtain the dismissal of the charges. By letter of April 19, 2001, Boggs wrote to the Union, ". . . we feel confident that we can continue to bargain in good faith despite the letter we received from the employees. . . . The employer stands ready to resume negotiations." In his "merit dismissal" letter, the Regional Director also noted that Respondent "reaffirmed its recognition of the Union, and its obligation to continue bargaining with it, has re-committed itself to tentative agreements reached to date in bargaining, and has agreed to meet with Union negotiators on May 4, 2001." By analogy to *Poole* and *Lee Lumber I,* I find that by entering into assurances that it would bargain in good faith with the Union in order to induce the Regional Director to dismiss the unfair labor practice charges, Respondent additionally undertook the obligation to bargain in good faith for a reasonable period of time.

As noted in *Lee Lumber I,* 322 NLRB at 178 (footnotes omitted):

> Here, the Respondent violated Section 8(a)(5) by refusing to bargain for several weeks. When it finally agreed to bargain, it did so before the violation had been found. Thus during the bargaining that ensued, the employees were not aware that Respondent's conduct was unlawful. . . . All the Respondent did to remedy its unlawful action, in other words, was to comply, belatedly, with its duty to bargain. In cases such as this, where an employer has violated its duty to bargain but the employees have not yet been informed that the employer is obligated to bargain with their representative and has agreed to do so, we think it especially appropriate that the employer bargain for a reasonable time before challenging the union's representative status. In such circumstances, where the employees are not even aware that the law is on the side of the union that represents them, it is particularly important for the newly restored bargaining relationship to be given a chance to succeed before the employer may question the employees' support for the union.

In determining whether a reasonable period of time for bargaining has elapsed, the Board considers what has transpired during the period of time, rather than the actual length of time which has elapsed. *King Soopers, Inc.,* 295 NLRB 35, 37 (1989). Factors which merit examination include whether the parties are bargaining for a first contract, whether the employer engaged in meaningful good-faith negotiations over a substantial period of time and whether an impasse in negotiations had been reached. The Board may also consider the severity of any other unfair labor practices or the length of the bargaining hiatus resulting from the unlawful refusal to bargain. *King Soopers,* 295 NLRB at 37.

I find that Respondent undertook the obligation to bargain in good faith for less than 2 months, not a substantial amount of time given the lengthy hiatus, with an attendant failure to promptly provide all information requested by the Union. This was not a reasonable period of time for bargaining given that the parties were bargaining for an initial contract almost 4 years after the initial certification, the Union was not provided with statutorily relevant information in a timely manner, the parties

were making significant progress toward reaching agreement, and no impasse in negotiations had been reached.

In agreement with counsel for the General Counsel, I conclude that Respondent may not aggregate the pre and postmerit dismissal bargaining for purposes of the reasonable period of time analysis. The reasonable period of time determination properly looks at the period following settlement (or in this case, the period following merit dismissal):

> In that settlement the Respondent agreed to resume bargaining after having earlier broken off negotiations because it questioned the Union's majority and withdrew recognition. In return for this renewed commitment to recognition and bargaining, the Union withdrew the unfair labor practice charges through which it had challenged the withdrawal of recognition. Under these circumstances, the Respondent could not again question union majority until it had bargained for a reasonable time; and the reasonableness of that bargaining cannot be determined simply by adding the months of bargaining presettlement to the postsettlement bargaining time and deciding whether the total is sufficient. Even accepting the fact that in some cases presettlement negotiations might cast light on the significance of postsettlement negotiating developments and that at some point the passage of time without agreement might itself establish that the Respondent had bargained for a reasonable time, we agree with the judge that where . . . the parties had met five times in about 3 months after recommencing negotiations and were making sufficient progress to warrant scheduling a sixth session, the Respondent had not satisfied the reasonable time standard so as to warrant its breaking off negotiations at that point on the basis of loss of union majority.

Shangri-La Health Care Center, 288 NLRB 334 fn. 2 (1998). On this basis, I decline to examine the premerit dismissal bargaining sessions or aggregate them with the postmerit dismissal session in order to analyze whether a reasonable period of time has occurred.

I. Across-the-Board Wage Increase

Prior to the March 26, 2001 cessation in bargaining, the parties reached a tentative agreement that employees would receive a 60-cent wage increase in May or June of each year. This tentative agreement was implemented in May or June 2000. After the parties resumed bargaining on May 4, 2001, the Union indicated that it was rescinding its tentative agreement to the wage increase. Nevertheless, Respondent granted the across-the-board wage increase in early June 2001. Respondent did not notify the Union that it intended to grant the wage increase nor did it afford the Union an opportunity to bargaining regarding the effects of the wage increase. The wage increase relates to wages and rates of pay and is a mandatory subject for the purposes of collective bargaining. Because I have found Respondent's withdrawal of recognition to be unlawful, Respondent was under a duty to notify the Union about the proposed wage increase and afford the Union a meaningful opportunity to bargain about it. In fact, the parties had already engaged in this discussion in May 2001, and the Union emphatically opposed the raise.

CONCLUSIONS OF LAW

1. By transferring Burman on March 2, 2001, from "used car prep-administrative position" to installer without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the transfer and the effects of the transfer, and at a time when Respondent and the Union had not reached an overall impasse in negotiations, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.
2. By failing and refusing since about April 24, 2001, to provide the Union with unit employee classifications and wage histories, Respondent has violated Section 8(a)(1) and (5) of the Act.
3. By granting an across-the-board wage increase to unit employees in June 2001, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the transfer and the effects of the transfer, and at a time when Respondent and the Union had not reached an overall impasse in negotiations, Respondent has violated Section 8(a)(1) and (5) of the Act.
4. By withdrawing recognition from the Union on June 1, 2001, notwithstanding the existence of an unremedied unfair labor practice in transferring an employee into the bargaining unit without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the transfer and the effects of the transfer, and at a time when Respondent and the Union had not reached an overall impasse in negotiations; notwithstanding that it based its withdrawal of recognition on the April 17, 2001 showing of interest in support of the petition in Case 32–RD–1377, the signatures of which were collected at a time when Respondent was refusing to bargain with the Union; and notwithstanding that a reasonable period of time for bargaining had not elapsed between the May 1, 2001, merit dismissal in Case 32–CA–18811–1 and the June 1, 2001 withdrawal of recognition within the meaning of *Poole Foundry,* supra, and *Liberty Fabrics,* supra, Respondent has violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have not included a provision enabling the Union to demand that the wage increase of June 2001 be rescinded because there has been no request for such a provision. Normally the Board does not order employers to rescind unlawfully granted benefits and pay increases.

I have included an affirmative bargaining order to vindicate the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the employer in April 1999, when Respondent initially withdrew recognition, again in March 2001 when it generally refused to bargain, and finally in June 2001, when it again withdrew recognition. At the same time, the affirmative bargaining order, with its attendant bar to

raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. This is particularly important in this case because Respondent's unfair labor practices have tainted decertification petitions and Respondent has continually questioned the Union's majority status. The Union should be free for a reasonable period of time from such actions.

[Recommended Order omitted from publication.]